1-1-2009

# Keeping the Underclass In Its Place: Zoning, the Poor, and Residential Segregation

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Publication Information
David Ray Papke, Keeping the Underclass In Its Place: Zoning, the Poor, and Residential Segregation, 41 Urb. Law. 787 (2009). 

# Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation

David Ray Papke*

IT HAS BECOME FASHIONABLE to argue that the preferences and choices of Americans living in metropolitan areas are changing.[1] Contemporary middle and upper-class Americans, the argument goes, no longer want to live in suburban subdivisions, work in office parks, and shop in enclosed malls. One-third of all homeowners now express a preference for living in compact urban settings or in older suburbs with an urban feel.[2] The phrase "demographic inversion" has been used to suggest that the well-to-do are blending into the center-city while the poor are joining the middle and upper classes on the metropolitan outskirts.[3]

These descriptions of change in American metropolitan areas are at best only partially true. "Gentrification," the process through which older parts of the center-city are redeveloped for condominiums, restaurants, and stores appealing to the middle and upper classes, has surely had an impact on many cities.[4] However, while some degree of gentrification has taken place in most downtown areas, the great majority of middle and upper-class Americans continue to live on the outskirts of the center-cities and even more so in the surrounding suburbs. In larger metropolitan areas the fastest population growth has occurred in the second and third rings of suburbs, in new communities that not long

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1. *See* Alan Ehrenhalt, *Trading Places—The Demographic Inversion of the American City*, NEW REPUBLIC, Aug. 13, 2008, at 19; Christopher B. Leinberger, *The Next Slum?*, ATLANTIC MONTHLY, Mar. 2008, at 70.

2. *See* Leinberger, *supra* note 1, at 74.

3. *See* Ehrenhalt, *supra* note 1, at 19.

4. Book-length studies of "gentrification" include LORETTA LEES, TOM SLATER & ERWIN WYLY, GENTRIFICATION (2008); KATH NELSON ET AL., GENTRIFICATION AND DISTRESSED CITIES: AN ASSESSMENT OF TRENDS IN INTRAMETROPOLITAN MIGRATION (1988). A useful collection of essays is GENTRIFICATION, DISPLACEMENT, AND NEIGHBORHOOD REVITALIZATION (J. John Palin & Bruce London eds., 1984).

ago were farmers' fields.[5] Even more strikingly, the poor and working classes continue to live in the older, postindustrial center-cities.[6] As a result, contemporary American metropolitan areas remain overwhelmingly segregated by socioeconomic class.[7] Rich people can see other rich people on the far side of their large suburban lots, and the poor live snugly next door to the poor.

No socioeconomic class is more concentrated than the underclass. Members of minority groups are disproportionately overrepresented in the underclass, but race is not the defining characteristic of the underclass. It consists of urban Americans with the weakest of ties to the labor market. Indeed, many members of the underclass have divorced themselves completely from legitimate employment. The underclass lives almost exclusively in dilapidated rental housing in the most rundown neighborhoods. The neighborhoods have high crime rates, with members of the underclass being both the most common perpetrators *and* victims.[8] Serious problems such as drug addiction, prostitution, and broken families are manifest, and the residential concentration of the underclass appears to exacerbate the social pathology.

Why do members of the underclass remain in the center-city? After all, Americans have in recent decades supposedly been relocating themselves at a rapid pace to places that they find culturally and socially appealing. Technological advances and material abundance have allegedly enabled Americans to choose their preferred neighborhoods and communities.[9] Unfortunately, members of the underclass do not have such choices at their disposal. More specifically, middle and upper-class suburbanites have used zoning laws to preclude the development of inexpensive rental housing that members of the underclass might afford, and the courts have been unreceptive to challenges to this zoning. The bourgeois power structure, it seems, perceives no problem in metropolitan residential segregation by class, and, indeed, the power

5. *See* JOSEPH A. RODRIGUEZ, CITY AGAINST SUBURB: THE CULTURE WARS IN AN AMERICAN METROPOLIS 5 (1999).

6. *See* J. David Greenstone, *Culture, Responsibility, and the Underclass, in* THE URBAN UNDERCLASS 405 (Christopher Jencks & Paul E. Peterson eds., 1991); *The Underclass: Hearing Before the Joint Economic Committee*, U.S. Government Printing Office 33 (May 25, 1989) [hereinafter *The Underclass*] (testimony of Lawrence M. Mead).

7. *See generally, The Underclass, supra* note 6.

8. *See* John Hagan & Ruth D. Peterson, CRIME AND INEQUALITY 3 (1995). "The victims of 'street crime' are overwhelmingly poor people, particularly blacks and Chicanos living in metropolitan areas." Tony Platt, *Street Crime—A View from the Left*, 9/10 CRIME & SOCIAL JUSTICE 26, 29 (1978).

9. *See* BILL BISHOP, THE BIG SORT, 14, 302 (Houghton Mifflin 2008).

structure may see distinct advantages in keeping the underclass literally in its place.

In the article that follows, the first section scrutinizes and outlines how suburban zoning ordinances keep the underclass out of the suburbs. In the second section, I examine the difficulties a complainant might encounter in challenging such zoning as unconstitutionally exclusionary. In conclusion, I reiterate the reasons the suburbs might want to keep the underclass out and also reflect on why the bourgeois power structure in general would want the underclass to remain concentrated in our center-cities. Overall, my goal in this article is not to critique lines of legal reasoning or to propose law reforms but rather to capture an oppressive aspect of American life and the role law plays in it.

## I. Zoning Out the Underclass

Zoning caught on and won constitutional approval in the United States in the years immediately following World War I.[10] New York City claimed to have enacted the first comprehensive zoning ordinance, but even more influential was a model zoning act distributed by Secretary of Commerce Herbert Hoover in 1922 and 1923.[11] By the end of 1923, 208 municipalities and 40 percent of the nation's urban population had zoning.[12] One reason for the remarkably rapid acceptance of zoning is that it afforded an effective way to control not only use districts and building sizes but also socioeconomic sectors of the population and those sectors' residential options.[13] When metropolitan areas burgeoned in the middle decades of the twentieth century, the use of zoning to control socioeconomic sectors of the population grew even more important. Particularly noteworthy for purposes of the article at hand are the successful efforts to zone the underclass out of the suburbs.

One need look no further than the earliest important zoning decisions for an awareness that zoning was about people as well as buildings. In *Miller v. Board of Public Works*,[14] for example, the court considered a Los Angeles emergency ordinance, adopted while formulating a more comprehensive zoning ordinance, making it unlawful to construct or alter buildings in certain districts so that the buildings could house more

10. *See* J.GORDON HYLTON, ET AL., PROPERTY LAW AND THE PUBLIC INTEREST 130 (2d ed. 2003).
11. *Id.*
12. *Id.*
13. *See infra* notes 21-35 and accompanying text.
14. *Miller*, 234 P. 381 (Cal. 1925).

than two families.[15] George Miller sought a writ of mandamus compelling the issuance of a building permit for a four-flat structure in the regulated area.[16] In upholding the denial of Miller's writ, the court held that Los Angeles' emergency ordinance was not a denial of constitutional guarantees and also "that it is within the police power, by zoning, to banish nuisances and 'near-nuisances' from certain districts."[17] More generally, the court thought that the creation of districts limited to single-family homes and duplexes made sense. "[J]ustification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home."[18] "It is axiomatic," the court stated, "that the welfare, and [] the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of the home environment."[19] Realizing, perhaps, that the linkage of character to certain kinds of housing could be seen as impugning the character of those who lived in other kinds of housing, the court added a series of awkward qualifications that served only to underscore its biases:

> We do not wish to unduly emphasize the single family residence as a means of perpetuating the home life of a people. There are many persons, who, by reason of circumstances, find apartment, flat, or hotel life necessary or preferable. Undoubtedly many families do maintain ideal home life in apartments, flats, and hotels; and it is also undoubtedly true that in many single family dwellings there is much of dissension and discord.[20]

The 1926 case that resulted in the United States Supreme Court's approval of zoning, *Village of Euclid v. Ambler Realty Co.*,[21] was based on a zoning ordinance that separated single family residential use districts from commercial and industrial use districts and also differentiated among residential uses, separating into different districts single family residential use from multi-family residential use.[22] Ambler Realty Company sought to invalidate Euclid, Ohio's zoning ordinance, which precluded commercial and industrial development on large portions of Ambler's land.[23] The federal district court agreed that the ordinance, as

15. *Id.* at 382-83.
16. *Id.* at 384.
17. *Id.* at 384.
18. *Id.* at 386.
19. *Miller*, 234 P. at 387.
20. *Id.*
21. 272 U.S. 365 (1926).
22. *See* Ambler Realty Co. v. Village of Euclid, 297 F. 307 (N.D. Ohio 1924).
23. *Id.*

applied to Ambler's property, was unconstitutional.[24] "[I]t takes [the] plaintiff's property, if not for private, at least for public use, without just compensation," the court stated.[25] In so doing, the ordinance "is in no [ ] sense a reasonable or legitimate exercise of police power."[26] While Ambler had been concerned with its loss of commercial and industrial development options, the court was more troubled by the way the ordinance established different districts for single-family, two-family, and apartment housing.[27] The drafters of the ordinance wanted "to classify the population and segregate them according to their income or situation in life."[28]

The United States Supreme Court upheld the ordinance's separation of housing type by district as within the ambit of the police powers, but, like the district court, perceived connections among zoning, housing type, and the people living in each type of housing. In his 6-3 opinion for the Court, Justice Sutherland analogized zoning to nuisance law, which was already well established,[29] and cast apartment buildings as a type of quasi-nuisance comparable to certain businesses and industrial uses; all of which could interfere with "the creation and maintenance of residential districts. . . ."[30] Sutherland then described at length how apartment buildings can destroy a neighborhood, casting them as nothing less than parasitical.[31]

Concerns about apartment buildings and apartment dwellers lived on, and, more generally, the biases imbedded in zoning acquired a sharper edge in the context of the accelerating suburbanization of the post-

24. *Id.* at 317.
25. *Id.*
26. *Id.*
27. *See Ambler Realty,* 297 F. at 309.
28. *Id.* at 316.
29. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
30. *Id.* at 390.
31. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. *Id.* at 394.

World War II decades.[32] Suburbs existed prior to then, but during the first half of the twentieth century Americans in general saw the cities and their suburbs as complementary.[33] In the post-World War II decades, by contrast, many Americans came to see cities and their suburbs as antagonistic. By the 1960s, some even "concluded that cities and suburbs represented completely different, and conflicting, cultural values."[34] It became increasingly common to speak of "an 'urban culture' and a 'suburban culture' as representing distinct outlooks and ways of life."[35]

The intensity of what became the suburbanites' attitudes regarding the central city should not be underestimated. Some suburbanites perceive the needs of the central city—better schools, extended social support programs, and enhanced law enforcement—as terribly expensive and do not want to tax themselves in order to address them. On a deeper level, many suburbanites, especially those in the so-called "edge cities" that constitute the outer ring of suburbs, see themselves as "normal, decent, and under siege."[36] These suburbanites construct their identities at least in part with reference to their communities' houses, streets, parks, and undeveloped land, and this "seemingly innocent appreciation of landscapes and desire to protect local history and nature can act as subtle but highly effective mechanisms of exclusion and reaffirmation of class identity."[37] Furthermore, the construction of identity is aided immensely if there is a "constitutive outside."[38] The scholar Gerald Frug even argues that suburbs require central cities as a constituent part of their identity.[39] "In the resulting, socially polarized metropolitan landscape, representations of cities as 'landscapes of fear' and their residents as inherently threatening flourished."[40]

Zoning is the major legal process used by contemporary American suburbs to keep the underclass, the rental housing in which it lives, and

32. The voluminous literature on changes in suburbanization includes ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA (1987); JOËL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1991); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); PETER O. MULLER, CONTEMPORARY SUBURBAN AMERICA (1981).

33. RODRIGUEZ, *supra* note 5, at 10.

34. *Id.*

35. *Id.*

36. STEVE MACEK, URBAN NIGHTMARES: THE MEDIA, THE RIGHT, AND THE MORAL PANIC OVER THE CITY 71 (2006).

37. JAMES S. DUNCAN & NANCY G. DUNCAN, LANDSCAPES OF PRIVILEGE: THE POLITICS OF THE AESTHETIC IN AN AMERICAN SUBURB 4 (Routledge 2004).

38. *See id.* at 3.

39. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 77 (Princeton Univ. Press 1999).

40. MACEK, *supra* note 36, at xvii.

"the city" itself out. While in an earlier era, race might have been used as a surrogate for class, the United States Supreme Court long ago ruled that zoning couched with reference to race was "in direct violation of the fundamental law enacted in the Fourteenth Amendment."[41] Today, class rather than race is the primary basis of exclusionary zoning, and although they may not speak of the "underclass" *per se*, suburban planners and zoning boards target the underclass for exclusion more so than any other socioeconomic group.

Perhaps needless to add, zoning ordinances do not mention the underclass or the poor in the zoning ordinances themselves. Instead, zoning ordinances use designations related to building locations, types, and sizes to indirectly address who might be able to live in certain areas or municipalities. This approach is both more politically copasetic and less susceptible to legal challenge, but the approach is hardly secret or clandestine. The major techniques of exclusionary zoning include zoning for non-residential uses only, or, in residential areas, using minimum lot size, minimum square footage, etc., which result in large, expensive homes being the only feasible development option.[42]

Overall, the techniques work in two ways. First, they might be employed to prompt development other than the type of inexpensive rental housing in which the underclass might live. Second, and sometimes in tandem, the techniques might be used to simply prevent the development of inexpensive rental housing. Regardless of the technique chosen, members of the underclass are rarely in a position to purchase even the smallest of single-family homes; rental housing is necessary if the urban poor are to call a suburb home.

If a suburb chooses techniques designed to prevent all residential development, problems might ensue. For starters, courts might invalidate the zoning.[43] Also the zones could fail to attract industrial or commercial development and remain empty, prompting complaints about harm to the tax base. If the zones did attract industry, meanwhile, the residents of the suburb might be unhappy with its presence or with workers who obtained jobs in the new plants. "Community" in outlying suburbs, after all, is a fragile matter, relying as much on appealing images and optimistic pro-

41. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

42. *See* PATRICIA E. SALKIN, AMERICAN LAW OF ZONING, § 22-17 TO § 22-30 (5th ed. 2008); PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 379-82 (2d ed. 2003); *see also* Gerald Frug, *The Legal Technology of Exclusion in Metropolitan America, in* THE NEW SUBURBAN HISTORY 205-19 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

43. *See* SALKIN, *supra* note 42, at § 22-17.

jections as on genuine interactions and social relations. In some suburbs "community" has to a large extent "been reduced to NIMBYism and the collective consumption of a romanticized landscape of community."[44]

A more common approach for suburban zoning authorities involves large-lot and wide-lot-frontage requirements, rendering the development of large, expensive homes as the only feasible option. More will be said in the next section of this article about the federal courts' reactions to exclusionary zoning, but for now it can be noted that as early as 1974 the United States Court of Appeals for the Ninth Circuit made clear that exclusive large-lot zoning would not be vulnerable to challenges mounted by the poor.[45] Two individuals and the Confederacion de la Raza Unida challenged the zoning ordinance of Los Altos, California, which provided that all housing lots in Los Altos consist of not less than one acre and contain no more than one primary structure. This approach to zoning kept out the poor and reinforced the exclusivity of the community.[46] The court found the zoning ordinance constitutional because it was "rationally related to preserving the town's rural environment."[47] Low-cost housing was available in other parts of the county, and the court stated that while California law did require a town to have housing for its residents, the law "does not require it to provide housing for non-residents, even though the non-residents may live in the broader urban community of which the town is a part."[48]

State courts have rejected challenges to large-lot zoning requiring even larger minimum lot sizes, assuming the challenged town or municipality can show the large-lot zoning was not purely arbitrary and unreasonable.[49] In a controversial Massachusetts case, for example, plaintiffs challenged a zoning ordinance that required all lots in about one-half of Edgartown to be at least three acres in size.[50] The zoning seemed clearly designed to fortify the socioeconomic exclusiveness of Martha's Vineyard. Suggesting the zoning would help protect the swampy Edgartown Great Pond, the appellate court held that the three-acre requirement was

44. DUNCAN & DUNCAN, *supra* note 37, at 5.

45. *See* Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

46. Indeed, the Court itself bluntly noted "no poor people live or work in Los Altos." *Id.* at 254.

47. *Id.*

48. *Id.*

49. *See, e.g.*, Countrywalk Condominiums, Inc. v. City of Orchard Lake Vill., 561 N.W.2d 405 (Mich. Ct. App. 1997); Johnson v. Town of Edgartown, 680 N.E.2d 37 (Mass. 1977); Ketchell v. Bainbridge Twp., 557 N.E.2d 779 (Ohio 1990); Kirk v. Zoning Bd. of Honey Brook Twp., 713 A.2d 1226 (Pa. Commw. Ct. 1998).

50. *See Town of Edgartown*, 680 N.E.2d at 37.

acceptable.[51] Indeed, it seems that the more exclusive a suburb aspires to be, the larger its lots will be. In the town of Bedford, New York, for example, eighty percent of the land has a four-acre minimum, and some communities in Marin County, just across the Bay from San Francisco, have five-acre zoning.[52]

If a suburb is less affluent or lacks undeveloped land for large-lot zoning, it might attempt to simply preclude the types of inexpensive rental housing in which the underclass might live such as multiple-family row houses and town houses, apartment buildings, and mobile homes. "Where apartments are permitted, some ordinances encourage luxury apartments by requiring specified land area for each family unit, and effectively exclude families by restricting the number of apartments which can be constructed with more than one bedroom."[53] A body of case law has emerged in New York, Pennsylvania, and New Jersey that impedes or at least challenges the most blatant exclusionary zoning of this sort,[54] but its impact is limited. "Unfortunately, because of the extraordinary difficulty of fashioning a remedy that would be politically acceptable and yet effective in responding to the needs of the excluded groups, little in the way of tangible change has taken place as a result of these cases."[55]

The hostility of the suburbs to mobile homes and the people who live in them is especially revealing.[56] Even though the mobile home is "one of the few available forms of nonsubsidized affordable housing,"[57] no other type of housing in America has been "more broadly vilified."[58] Why might that be? One could honestly complain that mobile homes

51. *See id.* at 41-42.

52. *See* DUNCAN & DUNCAN, *supra* note 37, at 87.

53. SALKIN, *supra* note 42, at 22-25.

54. *See* S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983); S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975); Robert E. Kurzius, Inc. v. Vill. of Upper Brookville, 414 N.E.2d 680 (N.Y. 1980); In re Appeal of Elocin, Inc., 461 A.2d 771 (Pa. 1983).

55. SALSICH & TRYNIECKI, *supra* note 42, at 378.

56. Mobile homes to some extent evolved from the trailer homes that first came to the public's attention in 1935. DAVID A. THORNBURG, GALLOPING BUNGALOWS: THE RISE AND DEMISE OF THE AMERICAN HOUSE TRAILER 1 (1991). Trailers grew in popularity during World War II and the late 1940s, but in the 1950s trailers started to grow larger, boxier, and flimsier. *Id.* at 174. What's more, the owners of this new breed of trailers were increasingly likely to stay put. The very wheels on their trailers shrunk and then disappeared completely. "The public at large continued to call these monsters trailers, much to the chagrin of builder and buyer alike. But they weren't trailers and hadn't really been trailers since they crossed the thirty-three-foot line." *Id.* at 174.

57. ALLAN D. WALLIS, WHEEL ESTATE: THE RISE AND DECLINE OF MOBILE HOMES 199 (1997).

58. *Id.* at v.

themselves are mass produced, standardized, and not particularly appealing to the eye. Those hostile to mobile homes could also argue that mobile homes deteriorate rapidly and that they are especially vulnerable to tornadoes, hurricanes and other storms. Indeed, mobile homes depreciate in value over time more like cars and trucks than single-family homes. That depreciation could conceivably wreak havoc with a suburban tax base.

In reality, though, excluding mobile homes from one's suburb relates less to the type of housing than to the type of people thought most likely to occupy that housing. Almost as soon as the mobile home market shifted in the 1950s to a less affluent and less educated population, mobile homes came to be seen by the middle and upper classes as decidedly déclassé.[59] As early as the 1950s residents of mobile home parks came to be seen as "trailer trash," and mobile homes parks concomitantly struck some "as a new kind of slum."[60] The negative bourgeois attitude regarding the presumably lower-class residents of the mobile home parks remained dominant in subsequent decades and even surfaced in comments by influential members of the national executive branch. In 1996, Paula Jones alleged President Bill Clinton had sexually harassed her while he was Governor of Arkansas. When inner-circle Clinton adviser James Carville responded to the allegations by Jones, he attempted to discredit Jones by playing on widespread bias against those who live in mobile homes. "Drag $100 bills through trailer parks," Carville said, "and there's no telling what you'll find."[61] Everyone appreciated that the comment was an insult to Jones; some realized it was also offensive to everyone living in mobile home parks.

Case law varies as to whether a municipality can completely preclude mobile homes,[62] but the "majority view supports the conclusion that a prohibition of trailer and mobile home parks from undeveloped areas is unreasonable and arbitrary and therefore a violation of due process."[63] Nevertheless, it is certainly the case that suburbs can restrict mobile homes and mobile home parks to designated areas and also prescribe conditions for their establishment and design.[64] Sometimes the designated areas for mobile home parks do not really exist. One Pennsylvania town, for example, restricted mobile home parks to commercial areas,

59. *See id. at* 188.
60. *Id.* at 173.
61. Adam Cohen, *Will She Have Her Day in Court*, TIME, Jan. 20, 1997, at 32.
62. *See* AL SHEPARD, MOBILE HOMES AND MOBILE HOME PARKS 274-76 (1975).
63. *Id.* at 275.
64. *See id.*

knowing in advance that no land for future parks was available in those areas. A court declined to find this approach arbitrary or unreasonable.[65] The courts have also upheld an ordinance that generally excluded mobile home parks, but permitted them in planned development districts with special application procedures.[66] Then, too, stringent guidelines and regulations on mobile homes themselves can effectively keep them out of town.[67] One survey found that mobile home placements were most likely to be restricted in communities that were wealthy, spent heavily on their schools, and were growing rapidly.[68] Outlying suburbs are perfect examples of communities with these characteristics.

Excluding mobile homes from the suburbs in hopes of keeping out poor people is only one illustration of how zoning is about not only land uses and buildings but also people. Zoning can be "a short-hand for unstated rules regarding what are widely regarded as correct social categories and relationships, that is, not only how land uses should be arranged but how land users, as a social category, are to be related to one another."[69] Like apartment dwellers in the 1920s, members of the contemporary underclass are held in low esteem. They are unwelcome in middle and upper-class communities, and zoning boards, planning commissions, and local officials have successfully zoned the underclass out of the suburbs.

## II. Constitutional Challenges to Exclusionary Zoning

If one hoped to stop exclusionary zoning by suburban governments, one might turn to federal constitutional law. While some state courts have attempted to limit exclusionary practices by state law,[70] federal constitutional law, especially the Fourteenth Amendment, on the surface offers greater promise. Local governments are political subdivisions of the state, and zoning ordinances enacted pursuant to state enabling statutes constitute state action.[71] The federal guarantees of due process

65. *See* Appeal of Groff, 274 A.2d 574 (Pa. 1971).

66. *See* Vill. Bd. of Tr. of Malone v. Zoning Bd. of Appeals of Vill. of Malone, 164 A.D.2d 24 (N.Y. App. Div. 1990).

67. *See* JOHN FRASER HART, MICHELLE J. RHODES, & JOHN T. MORGAN, THE UNKNOWN WORLD OF THE MOBILE HOME 22-23 (2002) (zoning authorities might employ such requirements as minimum height/length ratios, minimum floor areas, foundation requirements, exterior siding quality, window sizes, and even roof pitch and style).

68. *See* WALLIS, *supra* note 57, at 179.

69. CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 4 (1979).

70. *See* cases cited *supra* note 54.

71. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 519-20 (3d ed. 2000).

and equal protection could, therefore, plausibly apply. But alas, despite all of these premises holding firm, federal constitutional law has done almost nothing to alleviate the problem of zoning that excludes the underclass. In a string of important decisions from the 1970s, the United States Supreme Court closed the door to effective challenges by the underclass to suburban zoning, and this door has never been reopened.

The preclusion of challenges begins with the issue of who might sue an exclusionary local government. In particular, do those excluded have standing to sue? Article III of the United States Constitution, which both establishes and limits the courts' authority states, "The judicial power shall extend to . . . cases [and] . . . controversies."[72] The federal courts have taken this language to prevent the consideration of generalized grievances, as genuine and pressing as they might be.

The most important opinion regarding standing to challenge exclusionary zoning is *Warth v. Seldin*.[73] The plaintiffs in the case included various individuals residing in Rochester, New York; a trade association engaged in the construction of housing in the Rochester area; and a coalition of community groups trying to increase low and middle-income housing options.[74] The plaintiffs, troubled by what they perceived as exclusionary zoning in the town of Penfield, a suburb of Rochester, brought suit against Penfield and its zoning, planning, and town boards. Plaintiffs claimed Penfield's zoning ordinance allocated 98% of the town's vacant land to single-family, detached housing and employed lot size, setback, floor area, and habitable space requirements to preclude any housing low and moderate-income people might afford.[75] The plaintiffs also claimed Penfield:

> had delayed action on proposals for low- and moderate-cost housing for inordinate periods of time; denied such proposals for arbitrary and insubstantial reasons; refused to grant necessary variances and permits, or to allow tax abatements; failed to provide necessary support services for low- and moderate-cost housing projects; and had amended the ordinance to make approval of such projects virtually impossible.[76]

In his opinion for the Court, Justice Powell acknowledged a court's responsibility, when considering a motion to dismiss for lack of standing, to accept as true all material allegations of the complaint and also to construe the complaint in favor of the complaining party.[77] Hence, he

72. U.S. CONST. art. III, § 2.
73. Warth v. Seldin, 422 U.S. 490 (1975).
74. *Id.* at 490.
75. *See id.*
76. *Id.* at 495-96.
77. *See id.* at 501.

assumed "that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income."[78] He also assumed "that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded."[79]

Nevertheless, regarding the claims of the individual plaintiffs from Rochester, the Court held "[n]one of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's structures;[sic] and none has even been denied a variance or permit by respondent officials."[80] In short, they had no particularized injury caused by Penfield's zoning ordinance or actions thereunder. "Indeed," the Court stated, "petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of [Penfield's] assertedly illegal acts."[81] "We hold," the Court concluded, "only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention."[82]

The Court's pronouncements on standing prompted pointed dissents from its liberal wing. In a dissent joined by Justices White and Marshall, Justice Brennan asserted, "[T]he portrait which emerges from the allegations and affidavits is one of total, purposeful, intransigent exclusion of certain classes of people from the town."[83] In Brennan's view, at least three of the groups of plaintiffs had made allegations and provided enough evidence to have standing.[84] In a separate dissent, Justice Douglas said the petitioners' complaint that Penfield had used zoning "to foist an un-American community model on the people of this area"[85]

78. *Warth*, 422 U.S. at 502.
79. *Id.*
80. *Id.*
81. *Id.* at 506.
82. *Id.* at 507. The Court's opinion also went on to dismiss claims of other plaintiffs, leading one commentator to speculate that the decision reflected "a general disinclination on the part of the federal courts to become involved in exclusionary zoning-lawsuits." DAVID H. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 28 (Ballinger, 1977).
83. *Warth*, 422 U.S. at 523.
84. *See id.* at 521.
85. *Id.* at 519.

had been read by the court "with antagonistic eyes."[86] Douglas paused to reflect on the way people like to keep those they dislike out of their homes and communities:

> A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing areas of the community is akin to that when one wants to control the kind of persons who shares his own abode.[87]

Cases like *Warth*, he thought, "reflect festering sores in our society."[88]

There might in fact be members of the underclass who could demonstrate the type of particularized injury necessary to achieve standing under the Court's analysis. One who signed an anticipatory lease for a unit in a low-cost apartment complex that a developer had in mind for a specific suburban site may have standing. Alternatively, and perhaps more likely, members of the underclass could be referenced by a developer. Because of available tax credits and their perception of market opportunities, some developers are ready and able to develop low-cost suburban housing. If a developer encountered difficulty because of exclusionary zoning, the developer could sue the suburb and in the process argue on behalf of the members of the underclass who might not have been able to achieve standing on their own. Precedent dating back at least to the 1920s exists for the proposition that parties can argue on behalf of others if, for one reason or another, the latter are unable to achieve standing on their own.[89]

To be sure, arguments of this sort do not automatically prevail, and in 2004 the Supreme Court held that a group of Michigan attorneys could not assert the rights of indigent defendants denied appellate counsel.[90] The Court, however, acknowledged that a third party could assert the rights of another if (1) the party had a close relationship with the party who possesses the rights and (2) something hinders the possessor of the rights from protecting his or her interests.[91] It would be at least arguably true that a developer's relationship with a future tenant was sufficiently "close" and also that the practical difficulties faced by members of the underclass in finding low-rent housing in a suburb might consti-

86. *Id.* at 518.
87. *Id.*
88. *Warth*, 422 U.S. at 519.
89. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
90. *See* Kowalski v. Tesmer, 543 U.S. 125 (2004).
91. *Id.* at 129. In her dissenting opinion, Justice Ginsburg cast these requirements as "prudential considerations" that are important for a court to bear in mind. *Id.* at 137.

tute a severe hindrance. After all, the center-city poor are ill-equipped to know of particular housing possibilities in particular suburbs. Furthermore, members of the underclass are not privy to either developers' various plans or to a suburb's political rhythms and concerns.

Even assuming that an underclass plaintiff can demonstrate particularized injury or that a sympathetic developer invokes the interests of underclass citizens in a lawsuit against an exclusionary suburb, they are unlikely to prevail on the merits. In order to subject the exclusionary zoning to some degree of heightened scrutiny, the plaintiffs would have to (1) demonstrate their fundamental rights had been violated or (2) show they had been denied the equal protection of laws as members of a suspect class.[92]

As for the first possibility, the courts have found government action to violate fundamental rights of the poor,[93] but the courts have not taken housing to be one of those rights. The most important decision in the area is *Lindsey v. Normet*,[94] which grew out of tenants' complaints about the sorry state of their rented housing in Portland, Oregon. While the Supreme Court did find the state wrongful detainer statute's double-bond requirement for tenant appeals of an adverse decision to be an arbitrary and irrational violation of the guarantees of the Fourteenth Amendment,[95] the Court rejected any federal constitutional right to adequate housing. The Court said:

> We are unable to perceive in [the United States Constitution] any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.[96]

In short, there was no recognizable fundamental right to housing in the United States. Perhaps sounding more irritated than he intended,

92. *See* San Antonio Independent Sch. Dist. v. Rodriquez, 411 U.S. 1, 17 (1973); Harold E. Spaeth, *Strict Scrutiny, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 845 (Kermit L. Hall ed., 1992).

93. The Supreme Court has strictly scrutinized limitations on the rights of the poor with regard to voting and with regard to criminal trial and appellate processes. *See* Bullock v. Carter, 404 U.S. 134 (1972); Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Williams v. Illinois, 399 U.S. 235 (1970).

94. 405 U.S. 56 (1972).

95. *See id.* at 79.

96. *Id.* at 74.

Justice White's opinion reminded us that "the Constitution does not provide judicial remedies for every social and economic ill."[97]

With regard to an equal protection claim, the Fourteenth Amendment of the United States Constitution guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[98] One might think that suburban zoning ordinances designed to keep out the underclass would surely deny the underclass equal protection of the laws, but a major problem lurks. To wit, the Court has made clear since at least the 1970s that class distinctions are not a basis for equal protection claims. More specifically, poverty is not a suspect condition of the sort that would subject suburban zoning to heightened scrutiny.[99]

In *James v. Valtierra*,[100] the Court considered claims arising from the adoption by California voters of Article XXXIV of the state constitution, providing that "no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election."[101] Local governments qualified as "state public bodies," and a "low-rent housing project" was taken to be dwellings, apartments, or other living accommodations for the poor.[102] California defined "persons of low income" to be "persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."[103]

Given the requirements created by Article XXXIV, it was hardly surprising that various California communities held referenda regarding proposals for low-income housing and that the voters rejected those projects.[104] Citizens in the City of San Jose and also in San Mateo County sued, alleging, among other things, that the California law denied the poor equal protection of the laws by restricting the development of housing they could afford.[105] A three-judge district panel agreed with the plaintiffs,[106] but the United States Supreme Court reversed.[107]

97. *Id.*
98. U.S. CONST. amend XIV, § 1.
99. *See* James v. Valtierra, 402 U.S. 137 (1971).
100. *Id.*
101. *Id.* at 139 (discussing CAL. CONST. art. XXXIV, § 1 (1950)).
102. *Id.*
103. *Id.*
104. *See Valtierra*, 402 U.S. at 139.
105. *See id.*
106. *See* James v. Valtierra, 313 F. Supp. 1 (N.D. Cal. 1970).
107. *Valtierra*, 402 U.S. 137.

In his opinion for the Court in *Valtierra*, Justice Black carefully acknowledged an earlier decision in which the relevant state law referred to race,[108] but he underscored that the California referendum requirement did not apply only to low-rent housing that would necessarily be occupied by members of a racial minority group.[109] He also observed that the actual record "would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."[110] Obviously, Article XXXIV placed a special burden on those seeking to develop low-rent housing and, by extension, on poor people who might live in such housing, but Justice Black insisted, "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."[111]

As was the case with the other crucial decisions precluding or rejecting underclass challenges to exclusionary zoning, the Supreme Court's liberal wing filed a vigorous dissent. Justice Marshall, joined by Justices Brennan and Blackmun, thought Article XXXIV clearly singled out low-income persons and "on its face constitutes invidious discrimination which the Equal Protection Clause of the Fourteenth Amendment plainly prohibits."[112] Justice Marshall made clear that he did not think the equal protection guarantees of the Fourteenth Amendment were limited to race. "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and, to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."[113]

Without the argument that housing is their fundamental right or that they have been denied equal protection of the laws, members of the underclass find themselves in an unpropitious position. They would have to show suburban zoning is arbitrary or capricious, but as the discussion in this article's previous section suggests, courts have traditionally taken different zoning classifications for different plots to be reasonable.[114] A strong presumption of constitutionality attaches to zoning ordinances.[115]

108. *See* Hunter v. Erickson, 393 U.S. 385, 396-97 (1969) (where the relevant state law was Ohio law).
109. *See Valtierra*, 402 U.S. at 141.
110. *Id.*
111. *Id.* at 142.
112. *Id.* at 144.
113. *Id.* at 145.
114. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
115. *Id.*

Overall, then, the underclass has little reason to hope exclusionary zoning could be successfully challenged. "[O]ne should not be optimistic of the chances for success in the federal courts in a case challenging exclusionary zoning because it is economically discriminatory."[116] Suburban zoning in American metropolitan areas effectively prevents the underclass from living in the suburbs and thereby confines the underclass to the center-city. When this zoning has been challenged as exclusionary, the courts have for the most part denied standing for the plaintiffs or refused to accept their constitutional arguments. Law creates areas in which the poor cannot live and refuses to correct its handiwork.

## III. Conclusion

Any discussion of patterns in a large socio-legal phenomenon should acknowledge exceptions and counter-examples, and surely this is true in a discussion of exclusionary zoning and the underclass. Suburbs exist in which members of the underclass have been able to find low-cost rental housing.[117] These suburbs are likely to be older communities and to be located immediately adjacent to a center-city, but members of the underclass can and do call them home. Then, too, some appellate courts, most notably those in New Jersey, have ruled that cities and towns must plan for a variety of housing including inexpensive rental housing *and* take on their regional fair share of the latter.[118] Most generally, no shortage of commentators have been appalled by the current state of affairs and have suggested how "inclusionary" as opposed to exclusionary zoning might work.[119]

But exceptions, counter-examples, and pleas for reform notwithstanding, the overall pattern involving zoning and the underclass remains clear. Middle and upper-class Americans do not want the underclass nearby, and outlying suburbs in particular have used zoning ordinances

116. MOSKOWITZ, *supra* note 82, at 109.

117. One example is Harvey, Illinois, a suburb to the south of Chicago. An older, industrial town, Harvey became predominantly poor and African American in the late 1960s and early 1970s. *See* Earl Ray Hutchison, Jr., Black Suburbanization: A History of Social Change in a Working Class Suburb (1984) (Ph.D. dissertation, University of Chicago) (on file at Raynor Memorial Library, Marquette University).

118. For an intriguing commentary on New Jersey's *Mount Laurel* decision by its author, *see* Frederick W. Hall, *A Review of the Mount Laurel Decision, in* AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 39, 45 (Jerome G. Rose & Robert E. Rothman eds., 1977).

119. *See* Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006); DOUGLAS R. PORTER, INCLUSIONARY ZONING FOR AFFORDABLE HOUSING (2004).

to make it difficult if not impossible for members of the underclass to relocate to those suburbs. The federal courts, in turn, have been unreceptive to constitutional challenges to this variety of exclusionary zoning. As a result, members of the underclass stay put, dealing with urban blight and encountering difficulty finding, getting to, or even caring about jobs.

The reasons suburbanites do not want members of the underclass in their communities vary. For some, the chief reason is fiscal. Housing the poor, some are sure, would mean higher taxes to support more schools, law enforcement personnel, and social-welfare programs.[120] For others, the chief reason is fear of the underclass and of what the urban poverty connotes: dysfunctional families, crime, drug use, and "the city" in general. Middle and upper-class suburbanites are afraid the underclass will transport these aspects of social life into their communities.

Sometimes these fears seem racist, and, indeed, class biases in the United States are often coded with racial references. In reality, though, the issue is not one of race. Professionals and business executives who belong to minority groups can and do purchase appealing single-family homes and luxury condominiums in the suburbs. The urban poor, by contrast, are unable to find low-cost rental housing in the suburbs regardless of their race.

In addition to keeping the underclass out of the suburbs, might the power structure have reasons to keep the underclass in the center-city? The goals here would be less consciously intentional and more a matter of operational usefulness. Legislative studies would not call for them, and politicians would not base campaigns on them. Master plans would not address them directly. Nevertheless, keeping the underclass in center-city neighborhoods and ensuring the existence of such neighborhoods does have some usefulness for middle and upper-class suburbanites.

Two examples involve locating vice activities and assorted rehabilitative homes. Underclass neighborhoods can serve as marketplaces for prostitution and illegal drugs, that is, for services and goods some members of the middle and upper classes might want to purchase but not in their own neighborhoods and communities. Also, underclass neighborhoods can "be used for facilities other neighborhoods reject, from homeless shelters and halfway houses for AIDS patients and re-

120. *See* Jerome G. Rose, *The Courts and the Balanced Community, in* AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 15 (Jerome G. Rose & Robert E. Rothman eds., 1977).

habilitated drug abusers to toxic and other dumps."[121] All metropolitan areas need "stigmatized areas" of this sort to operate,[122] but the concentration and further development of such facilities "help ensure that underclass communities are perceived as dysfunctional and dangerous communities."[123]

The most important functional ramification of keeping the underclass in center-city neighborhoods is containment. Because the underclass for the most part lacks rewarding and sustained employment, bourgeois interests do not exploit the underclass in the way they exploited the traditional agricultural and industrial working class. Individual members of the underclass continue to own their own "units" of labor power, but the labor power ceases to have exploitable value in advanced capitalism if it is not deployed.[124] As a result, the underclass is virtually expendable in the reigning socioeconomic system, and some might wish the underclass would somehow disappear. That is impossible, and in fact the underclass is growing and becoming more visible as its residential segregation increases. "The alternative, then, is to build prisons and to cordon off the zones in cities in which the underclass lives."[125] This has the effect, at least, of containing what is perceived as a problem.

In the end, this containment constitutes a variety of oppression. Segregated in deteriorating center-cities, the underclass copes with not only its impoverishment but also weaker family structures, poorer health, and more exposure to crime and violence. Most generally, the underclass has less opportunity, fulfillment, and happiness than the middle and upper classes. Zoning and the bourgeois legal system in general play major roles in creating and perpetuating the contemporary American underclass. There seems little likelihood of change in the near future.

121. HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY 37, 99 (1995).

122. *Id.*

123. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS 1890-1990 260 (1993).

124. *See* Erik Olin Wright, "Class Analysis," *in* SOCIAL CLASS AND STRATIFICATION: CLASSIC STATEMENTS AND THEORETICAL DEBATE 143, 154 (Rhonda F. Levine ed., 1998).

125. *Id.* at 155.